## ORAL ARGUMENT NOT YET SCHEDULED

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-1044

JOHN DOE,

Petitioner,

V.

#### THE SECURITIES AND

#### **EXCHANGE COMMISSION,**

Respondent.

## REVIEW OF THE SECURITY AND EXCHANGE COMMISSION'S FINAL WHISTLEBLOWER DENIAL

#### **BRIEF FOR PETITIONER**

WASHINGTON GLOBAL LAW GROUP By: Max Maccoby 1701 Pennsylvania Avenue, N.W., Suite 200 Washington, D.C. 20006 (202) 248-5439 maccoby@washglobal-law.com

Dated: June 12, 2023

# CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Counsel for Petitioner certifies:

### 1. Parties and Amici

Petitioner ("Claimant") is the only party who, to his knowledge, is seeking this Court's review of the final whistleblower denial decision of the Security and Exchange Commission ("Commission"). The Respondent is the Commission. There are no intervenors or amici.

### 2. Rulings Under Review

The decision at issue before the Court is the final order of the Commission entered on \_\_\_\_\_\_ in whistleblower award proceeding file no. \_\_\_\_\_\_, which denied Claimant's whistleblower application.

#### 3. Related cases

There are no related cases on appeal.

### TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES	i
TABLE OF AUTHORITIES	iv
GLOSSARY OF ABBREVIATIONS	vi
STATEMENT OF JURISDICTION	vii
STATEMENT OF STANDING	vii
PERTINENT STATUTES AND REGULATIONS	vii
STATEMENT OF ISSUE PRESENTED FOR REVIEW	vii
STATEMENT OF THE CASE	1
I. Introduction	1
II. PROCEEDINGS BELOW	3
III. STATEMENT OF FACTS	4
Α.	4
В.	5
C. Claimant blows the whistle	7
D. The investigation and prosecution	9
E. The Commission denies Claimant's whistleblower of	elaim 12
SUMMARY OF THE ARGUMENT	14
STANDARD OF REVIEW	14

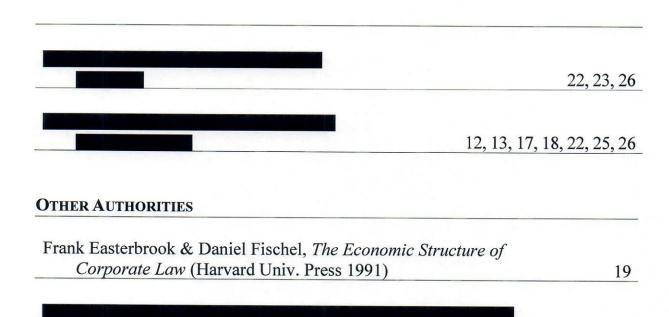
Argument	15
I. THE COMMISSION ABUSED ITS DISCRETION WHEN IT CONCLUDED THAT CLAIMANT HAD NOT PROVIDED "ORIGINAL INFORMATION"	15
A. The Original Information Rule	15
В.	17
1.	17
2.	22
3.	24
Conclusion	27
CERTIFICATE OF COMPLIANCE	28
CERTIFICATE OF SERVICE	28
PERTINENT STATUTES, REGULATIONS, AND RULES	29

# TABLE OF AUTHORITIES

CASES	
Burnet v. Clark, 287 U.S. 410 (1932)	19
Commonwealth v. Gibson, 940 A.2d 323 (Pa. 2005)	26
Johnston v. SEC, 49 F.4th 569 (D.C. Cir. 2022)	15, 20
Motor Vehicle Manufacturers. Association v. State Farm Mutual Auto Insurance Co., 463 U.S. 29 (1983)	15
Ross v. SEC, 34 F.4th 1114 (D.C. Cir. 2022)	15
State v. Schubert, 561 A.2d 1186 (N.J. Super. App. Div. 1989)	24
STATUTES	
5 U.S.C. § 702	vii
5 U.S.C. § 706	14, 15
	vii, 12, 14, 15, 16
REGULATIONS AND RULES	
	vii, 12, 14, 16, 17
17 C.F.R. § 240.21F-13	vii

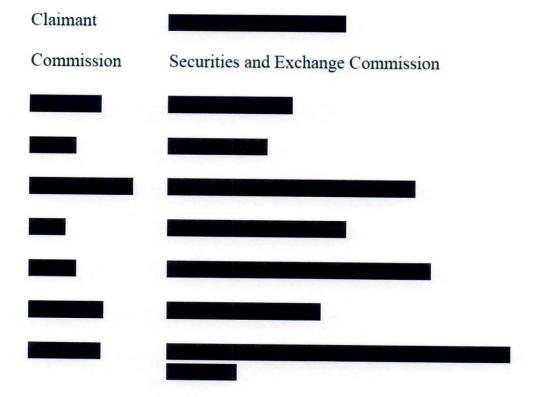
25

25



<sup>\*</sup> Indicates authority principally relied upon

The following abbreviations are used in this brief:1



<sup>1</sup> For clarity and consistency, and in accord with D.C. Circuit Rule 28(d), this brief uses the same party designations used in the agency proceeding (*i.e.*, "Claimant" and "Commission"). And if this brief uses an abbreviation for an individual or corporate entity, that abbreviation is also the same as those used in the agency proceeding

## STATEMENT OF JURISDICTION

Claimant appeals the Commission's final order pursuant to this Court's original jurisdiction under 15 U.S.C § 78u–6(f) and 17 C.F.R. § 240.21F-13.

## STATEMENT OF STANDING

Claimant has standing for this appeal under 15 U.S.C § 78u–6(f), 17 C.F.R. § 240.21F-13, and 5 U.S.C. § 702, as an aggrieved person because the Commission denied his whistleblower award application.

## PERTINENT STATUES AND REGULATIONS

15 U.S.C. § 78u-6(a)(3)

17 C.F.R. § 240.21F-4(b)(4)(ii)

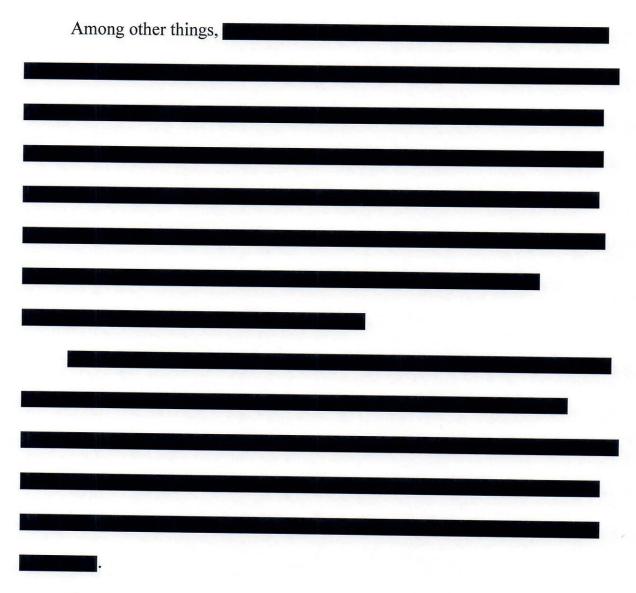
# STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the Commission err when it denied Claimant's award application based on the Commission's conclusion that Claimant had not provided "original information"

# STATEMENT OF THE CASE

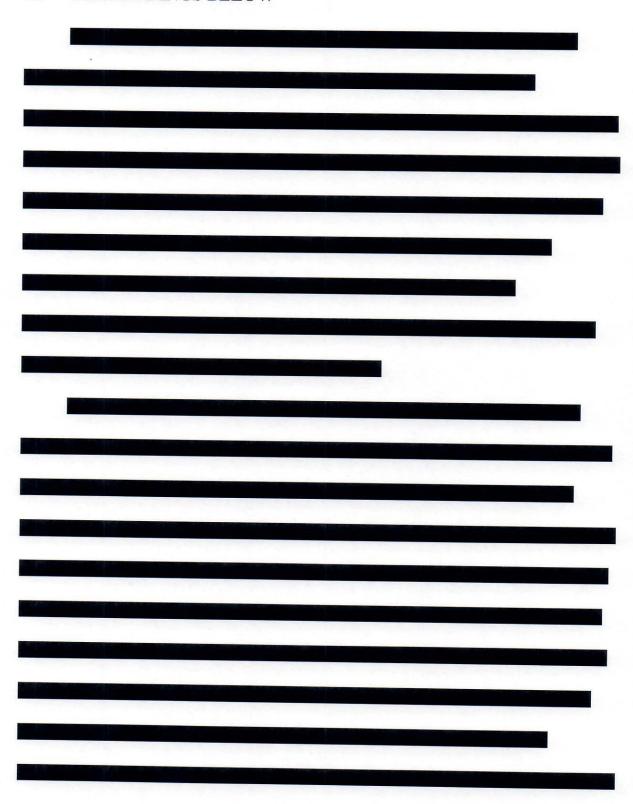
#### INTRODUCTION I.

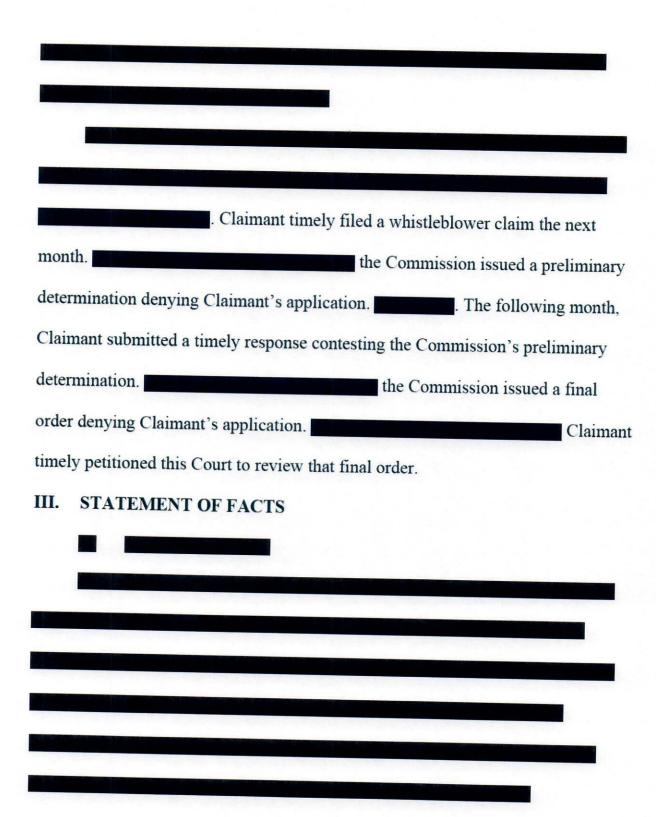
This whistleblower appeal arises from a
Claimant submitted a whistleblower award application for recognition of his
services. The Commission, in a fatally flawed decision, denied Claimant's
application. The Commission based its decision on a wholly irrational conclusion
that Claimant should not have made his tip because
The Commission's decision was wholly irrational. In reality,



For these reasons, and those that follow, the Commission's decision denying Claimant's award application was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law. Its reasoning was irrational, its proffered explanations wholly unsatisfactory. Claimant therefore respectfully requests that this Court reverse that decision.

## II. PROCEEDINGS BELOW





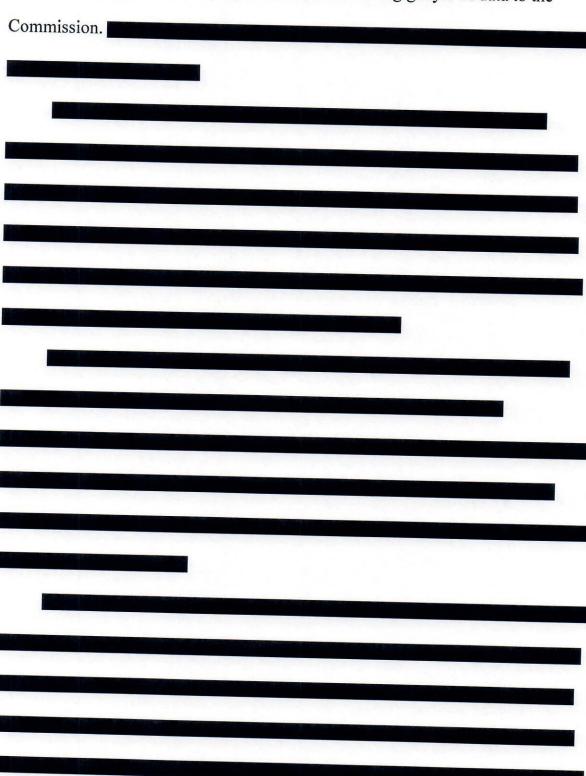






in Claimant's response to the Commission's subsequent preliminary determination denying his whistleblower award application, Claimant notes The investigation and prosecution D. Based on Claimant's tip, as noted, the Commission launched an investigation

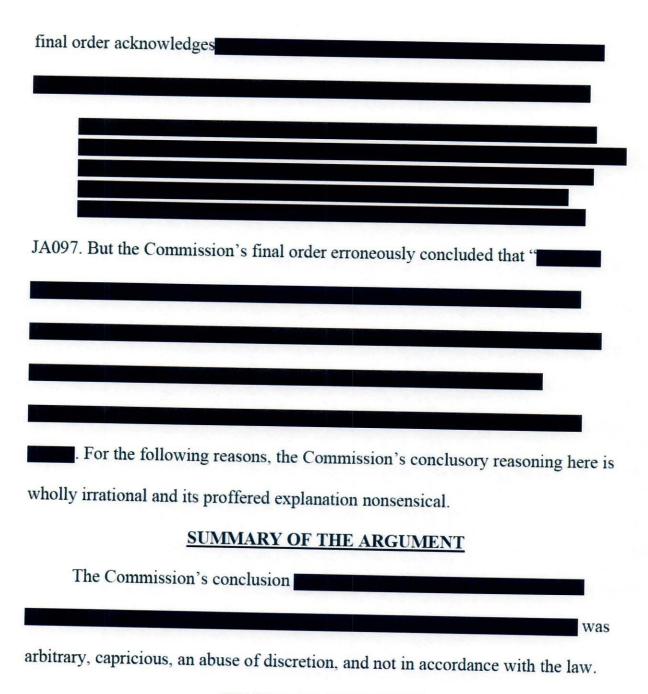
Thereafter, Claimant also provided substantial assistance to the Commission in its investigation. He sat for voluntary interviews, both in person and by phone.



#### E. The Commission denies Claimant's whistleblower claim

As this was transpiring, the Commission issued a notice of covered action
inviting whistleblower award applications, which Claimant timely did.
Commission issued a preliminary determination denying
Claimant's claim.
The Commission's preliminary determination erroneously concluded that
Claimant
because, the Commission
reasoned,
The Commission's decision, however, failed to substantively address, much
less correctly apply,
And in this instance,

After Claimant received the Commission's proliminary data with a
After Claimant received the Commission's preliminary determination, he
promptly requested reconsideration of that determination. In his request, Claiman
pointed out the Commission's error, observing that
Claimant's syvam declaration which have 1 1 1 1
Claimant's sworn declaration, which he attached to his
request for reconsideration, likewise adds, "
In January 2023, the Commission issued a final order denying Claimant's
whistleblower award application. In pertinent part, the Commission's



## STANDARD OF REVIEW

This Court reviews the Commission's decision "in accordance with section 706 of [the Administrative Procedure Act]." 15 U.S.C. § 78u-6(f) (citing 5 U.S.C. § 706). Therefore, the Commission's decision must be reversed when it is

"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); see also Ross v. SEC, 34 F.4th 1114, 1118 (D.C. Cir. 2022). And for the Commission's decision to be upheld, the Commission "must have examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Johnston v. SEC, 49 F.4th 569, 575 (D.C. Cir. 2022) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983)) (quotation marks and brackets omitted). Here, the Commission's decision fails to meet this standard and must therefore be reversed.

#### **ARGUMENT**

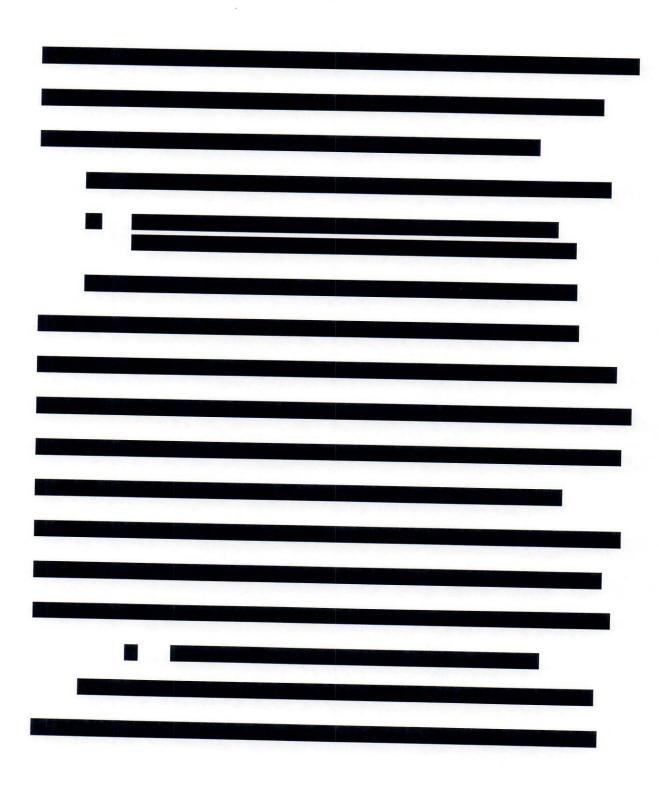
- I. The Commission Abused Its Discretion When It Concluded that Claimant Had Not Provided "Original Information"
  - A. The Original Information Rule

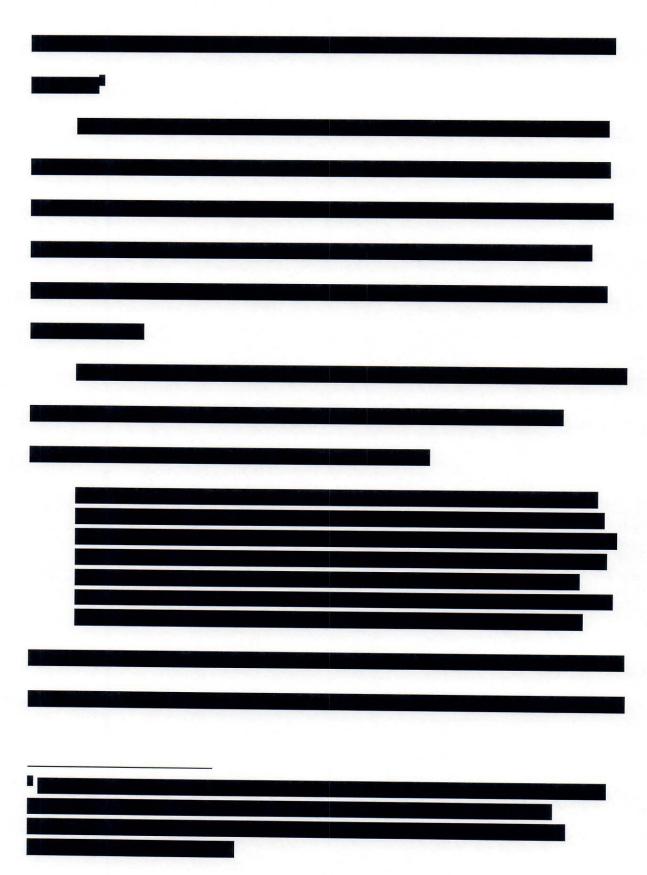
"Under the Dodd-Frank Wall Street Reform and Consumer Protection Act," this Court notes, "Congress created a whistleblower award program that provides monetary incentives to individuals with knowledge of securities violations to assist the government in identifying and prosecuting the violations." Ross v. SEC, 34 F.4th 1114, 1118 (D.C. Cir. 2022) (citation omitted). This Court explains, "the Commission is authorized to give monetary awards to 'whistleblowers who voluntarily provided original information to the Commission that led to the

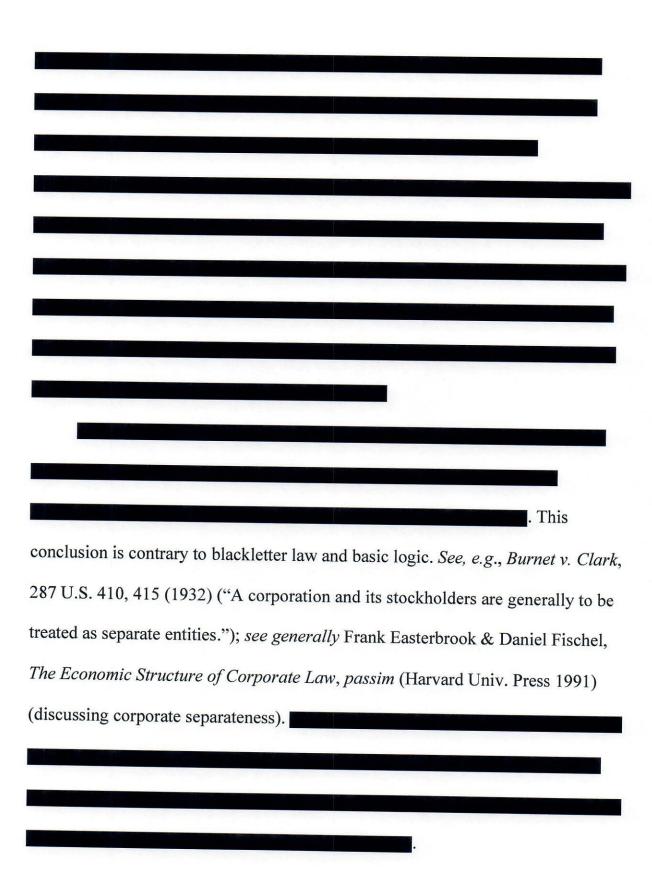
successful enforcement of the covered judicial or administrative action." *Id.* (quoting 15 U.S.C. § 78u-6(a)(1)) (emphasis added).

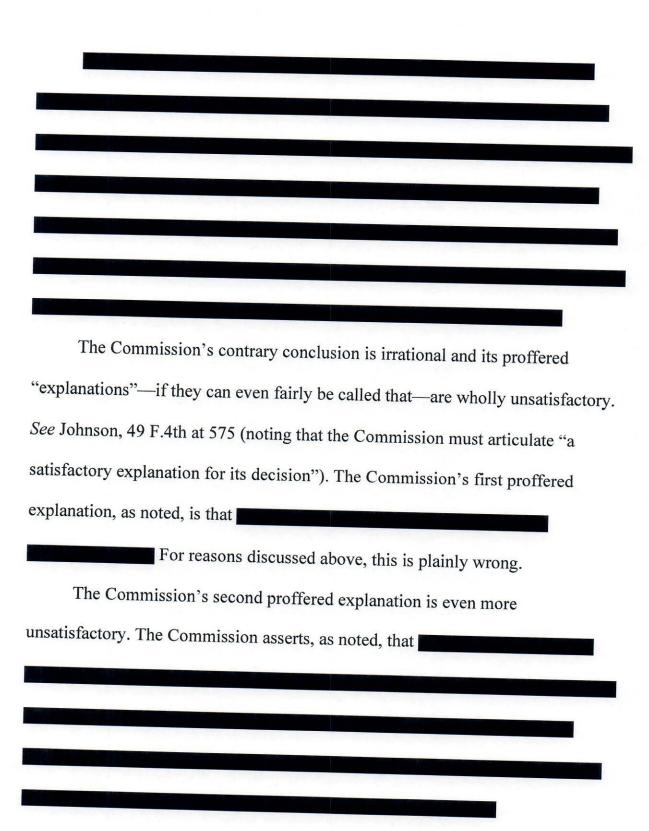
The Act defines "original information" as information that (1) "is derived from the independent knowledge or analysis of a whistleblower"; (2) "is not known to the Commission from any other source, unless the whistleblower is the original source of the information"; and (3) "is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information." 15 U.S.C. § 78u-6(a)(3)(A). Here,

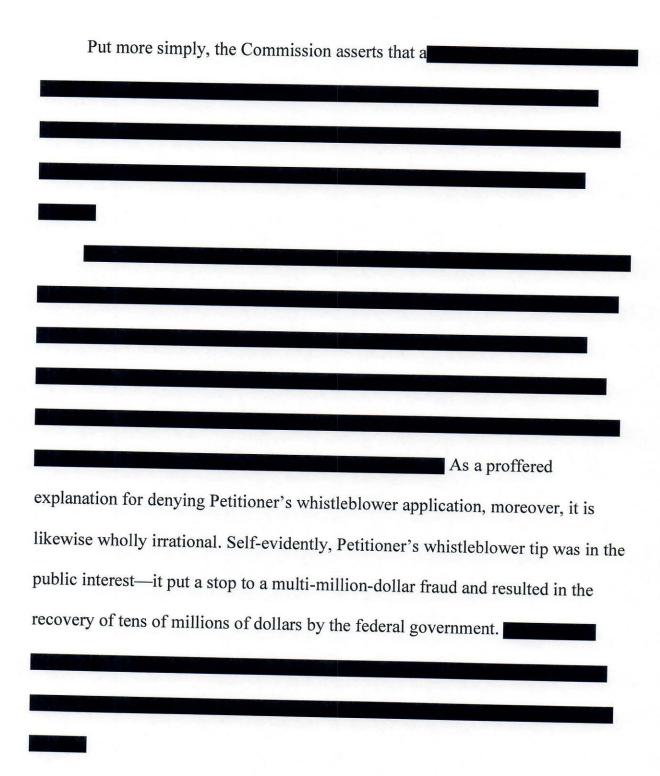
	me information.	3	0(4)(5)(11).	Tiere,
The second second				

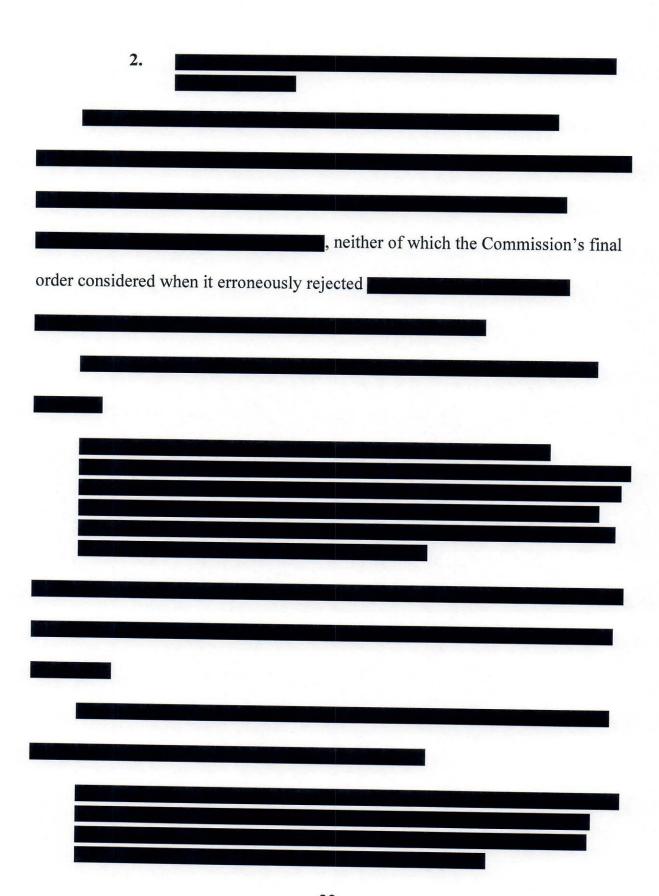


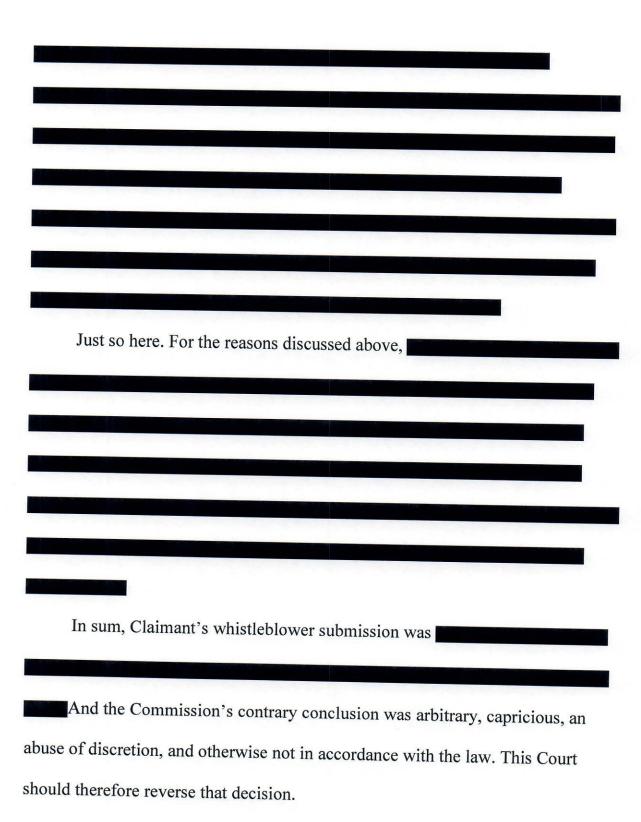


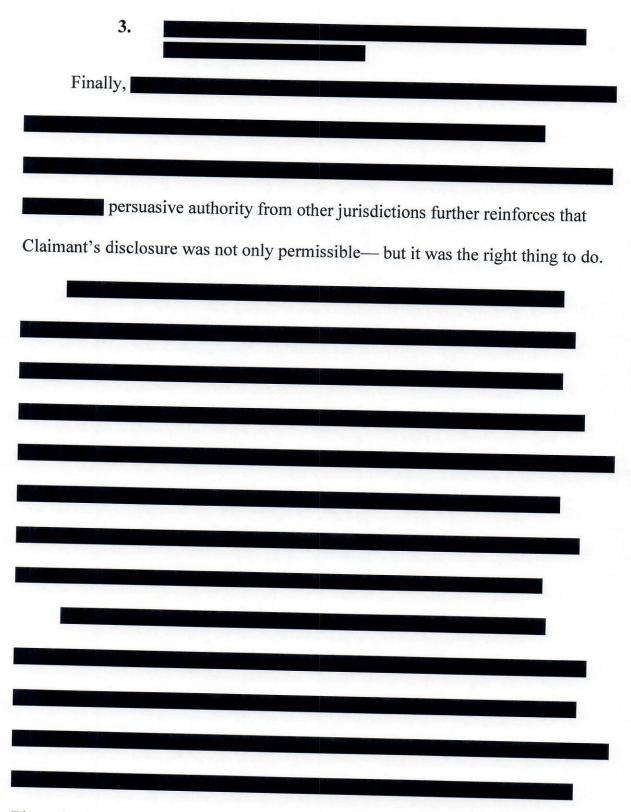












Thus, the fundamental policy considerations weigh even more strongly in

For reasons discussed above, just so here.

And the Commission's contrary conclusion was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law. This Court should therefore reverse that decision.

#### **CONCLUSION**

For the foregoing reasons, Claimant respectfully requests that this Court reverse the Commission's final order denying Petitioner's whistleblower award application and remand the case to the Commission for determination of the proper amount of the award.

Respectfully submitted,

/s/ Max F. Maccoby
Max F. Maccoby
WASHINGTON GLOBAL LAW GROUP
1701 Pennsylvania Avenue, N.W., Suite 200
Washington, D.C. 20006
Tel. (202) 248-5439
maccoby@washglobal-law.com

Filed: 06/12/2023

Dated: June 12, 2023

Counsel for Petitioner

## **CERTIFICATE OF COMPLIANCE**

In accord with Federal Rules of Appellate Procedure 28(a)(10) 32(g), I certify that:

- 1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 5,909 words, including footnotes; and
- 2. This document complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 21(d) and 32(c) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman.

/s/ Max Maccoby

Dated: June 12, 2023

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 12th day of June, a copy of the

foregoing was served by electronic mail to:

William K. Shirey
U.S. Securities and Exchange Commission
100 F. St., N.E.
Washington, D.C. 20549

/s/ Max Maccoby

# PERTINENT STATUTES, REGULATIONS, AND RULES

### 15 U.S.C. § 78u-6(a)(3)

The term "original information" means information that:

- is derived from the independent knowledge or analysis of a (A) whistleblower;
- is not known to the Commission from any other source, unless the (B) whistleblower is the original source of the information; and
- (C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

